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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. JERMAINE DAMON SANTANA, Defendant and Appellant.	C058125 (Super. Ct. Nos. SF102841A, SF098124A, SF097884A)

On November 15, 2005, in case No. SF097884A, defendant Jermaine Damon Santana entered a negotiated plea of no contest to an amended charge of receiving stolen property (motor vehicle), a felony (Pen. Code, § 496d, subd. (a)), in exchange for dismissal of another count and a grant of probation with eight months in county jail. The same day, in case No. SF098124A, defendant entered a no contest plea to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). He was to be evaluated for a substance abuse treatment program in the deferred entry of judgment program. After defendant informed the probation officer that he would rather go to jail than the treatment program, the court suspended imposition of sentence in both cases and granted probation for a term of five

years subject to certain terms and conditions including eight months in county jail in each case, to be served concurrently.

On May 2, 2007, in case No. SF102841A, defendant entered a negotiated plea of guilty to an amended charge of possession of cocaine base (Health & Saf. Code, § 11350--count 1) as well as failure to appear (Pen. Code, § 1320, subd. (b)--count 4) in exchange for dismissal of the remaining counts, a 16-month state prison sentence with execution suspended, and a grant of probation for five years subject to defendant's completion of a drug court program. Defendant waived Proposition 36 referral.

Defendant violated probation and was sentenced to state prison for an aggregate term of two years as follows: the midterm of two years for possession of methamphetamine in case No. SF098124A; a concurrent midterm of two years for receiving stolen property in case No. SF097884A; and concurrent midterms of two years for possession of cocaine base and failure to appear in case No. SF102841A.

Defendant appeals. He contends (1) the trial court violated his right to due process in admitting hearsay testimony at the probation revocation hearing and (2) the court incorrectly increased his sentence. We shall affirm the judgment.

FACTUAL BACKGROUND

We can dispense with the facts underlying the offenses since they are not relevant to the issues raised on appeal. We

recount the facts underlying the probation violation instead. The probation officer alleged that defendant violated probation by failing to "enroll and/or successfully complete the [c]ourt ordered treatment program" and "obey reasonable directions of [the] [p]robation [o]fficer." The probation officer explained: "On 6/28/07, this [o]fficer was notified of the [f]elony [d]rug [c]ourt termination for failure to attend the program. On 7/7/07 the defendant was arrested on [c]rime [c]ase SP07-35730 and bench warrants for AMOS cases A919251 and A942056. His continued criminal behavior and previous history on [p]robation indicates his lack of accountability and his unamenability to [p]robation."

At the probation revocation hearing on August 22, 2007, Dorothy Aparicio, defendant's case manager, testified that defendant's drug court program contract which he initialed and signed, required him to, inter alia, abstain from the use of drugs including alcohol, appear in drug court monitoring hearings every Monday, and enroll in and complete any outpatient or inpatient counseling program as recommended. On May 21, 2007, defendant was required to attend counseling sessions at the Chemical Dependency Counseling Center (CDCC) from 9:00 to 10:30 a.m., Tuesday through Friday. Defendant attended the program at CDCC. When defendant then had a death in the family, he asked to be excused from drug court on Monday, June 18, 2007, for a funeral. Aparicio met with defendant on Monday, June 18, 2007, in drug court; excused him early; told him to return to

CDCC four days a week, which meant beginning the next day, Tuesday, June 19, 2007; and may have given him a referral to grief counseling.

Over defendant's hearsay objection, Aparicio testified that she received a progress report on June 22, 2007, from James Wheat at CDCC, wherein he stated that defendant had been told to return to group the last time he was in court but had not reported back to CDCC since then. Wheat recommended that defendant be remanded at the next court appearance, meaning sent to county jail, rather than terminated from CDCC. CDCC had a rule providing for termination from CDCC for three consecutive absences.

Based on Wheat's report, Aparicio had intended to recommend remand but defendant failed to attend drug court on Monday, June 25, 2007. On June 25, defendant was terminated from the drug court program and referred to probation for the violation.

On cross-examination, Aparicio testified that she recognized Wheat's signature on the progress report dated June 22, 2007. Boxes on the form next to unexcused, late for group, unexcused group, urine test, meeting, or number of meetings, were not checked. Instead, Wheat had written on the report that defendant had been ordered to return to group the last time he was in court but defendant had not reported back.[1]

[1] Defense counsel had Wheat's progress report marked for identification as defendant's exhibit 1 but did not thereafter move to admit the report into evidence.

Aparicio testified that when defendant appeared in court on Monday, June 18, 2007, she ordered defendant to report to CDCC, giving him the time and dates.

Defendant's probation officer testified that he filed the probation violation allegation that defendant failed to complete the felony drug court program. Defendant had been reporting to the officer on a regular basis.

Defendant testified and admitted that he missed the counseling sessions at CDCC identified by Aparicio. He explained that there had been a death in his family and he had asked Aparicio if he could be excused from drug court early on June 18, 2007, the date of the funeral. He claimed that Aparicio approved his absence and told him to return to court on June 25, 2007. He remained with his family in Oakland and missed the counseling sessions from Tuesday, June 19 through Friday, June 22, 2007, because he could not obtain transportation. He admitted he did not try to contact either Aparicio or Wheat. He did not return to Stockton until June 29, 2007, and about that time, met with Wheat who told him to make a new date for court. Defendant claimed he did, July 9, 2007, but that he was arrested before he could go to court. He also admitted that he used marijuana before he began the program and after he missed the counseling sessions, having relapsed.

At the conclusion of the testimony, defense counsel stated that she had been "contemplating getting [the] CDCC records" but had not subpoenaed them. The court responded, "If you want to

call somebody, I will give you a chance to do that. He has admitted he didn't report for that week, and that is what has basically been testified to. [¶] . . . [¶] . . . In terms of the CDCC issue. It is his own testimony." Defense counsel then submitted the matter.

In finding defendant had violated probation, the court determined that defendant had failed to attend the counseling sessions at CDCC, used marijuana on "[t]wo occasions by [defendant's] own admission," and failed to attend drug court.

DISCUSSION

I

Defendant contends that the trial court's admission of hearsay testimony about the missed counseling sessions at CDCC violated his right to due process to confront and cross-examine drug counselor Wheat. He argues that it was necessary to his defense "to determine if the counselor still considered [defendant] to have been in willful violation of his probation." Distinguishing *People v. O'Connell* (2003) 107 Cal.App.4th 1062 (*O'Connell*), defendant argues that Wheat's report "did not have the requisite indicia of trustworthiness." Defendant further argues that there was no good cause for Wheat's absence at the hearing. Finally, defendant argues that the error was prejudicial.

Relying upon *O'Connell* and *People v. Abrams* (2007) 158 Cal.App.4th 396 (*Abrams*), the Attorney General argues that the evidence Aparicio relied upon, that is, Wheat's report of

defendant's failure to attend counseling sessions during a specified period, was a "routine matter" about which hearsay is admissible. The Attorney General further claims that any error was harmless in view of defendant's admission that he missed the counseling sessions claimed in Wheat's report. In any event, the Attorney General asserts that because defendant admitted to relapsing by using marijuana after the missed sessions, there was sufficient evidence to support the court's revocation of probation.

We find no error. In any event, any error was harmless in view of defendant's admission at the probation revocation hearing that he missed the sessions claimed, started using marijuana again after missing the sessions, and missed drug court on June 25, 2007.

The right of confrontation guaranteed by the Sixth Amendment does not apply to probation revocation hearings. The right of confrontation at such a hearing "stems, rather, from the due process clause of the Fourteenth Amendment. [Citations.] Those confrontation rights, however, are not absolute, and where appropriate, witnesses may give evidence by '"affidavits, depositions, and documentary evidence."'" (*Abrams*, *supra*, 158 Cal.App.4th at p. 400.)

Documentary hearsay evidence may be admissible at a probation revocation hearing "if there are sufficient indicia of reliability" (*People v. Maki* (1985) 39 Cal.3d 707, 709) or a "'substantial guarantee of trustworthiness'" (*id.* at p. 715).

In contrast to evidence that is testimonial such as a transcript of former live testimony, "the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." (*People v. Arreola* (1994) 7 Cal.4th 1144, 1157 (*Arreola*).) Thus, defendant misplaces his reliance upon case law dealing with the use of hearsay based on statements viewed as substitutes for live testimony, rather than documentary evidence, at a probation/parole revocation hearing. (*Arreola*, at pp. 1160-1161 [preliminary hearing transcript admitted without showing of good cause for witness's unavailability violated defendant's due process right]; *People v. Winson* (1981) 29 Cal.3d 711, 713-714 [same]; *People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1197-1203 [probation officer's testimony at hearing recounting hearsay statements by treatment providers that defendant smelled of, and tested positive for, alcohol consumption required a good cause showing for provider's unavailability]; *United States v. Comito* (1999) 177 F.3d 1166, 1168-1169 [officer's hearsay testimony with respect to victim's oral statements about defendant's use of her credit cards, bank accounts and checks without her consent lacked a good cause showing for victim's

unavailability and violated defendant's confrontation rights]; see also *People v. Stanphill* (2009) 170 Cal.App.4th 61, 65, 66-67 [officer's hearsay testimony at a probation revocation hearing recounting the unsworn statement of the victim identifying defendant's photograph as an assailant was admissible as a spontaneous statement, satisfying defendant's due process confrontation right].)

"The burden of proof at a probation violation hearing is by a preponderance of the evidence. [Citations.] We review rulings on whether hearsay was improperly admitted at a violation hearing for abuse of discretion." (*Abrams*, *supra*, 158 Cal.App.4th at p. 400; *O'Connell*, *supra*, 107 Cal.App.4th at pp. 1066-1067.)

On facts similar to those here, the court in *Abrams* concluded that the evidence from a probation report written by a deputy probation officer (Smith) other than the deputy who testified (Dangerfield) had sufficient "indicia of reliability" to be admissible to prove that defendant had been ordered to report on a date certain but failed to show up or contact the probation officer. (*Abrams*, *supra*, 158 Cal.App.4th at pp. 404-405.) *Abrams* explained: "The presence of DPO Smith likely would not have added anything to the truth-furthering process, because he would be testifying to a negative: that defendant did not make any appointments and that Smith had not spoken to defendant." (*Id.* at p. 404.) *Abrams* also noted that the probation report was "'prepared contemporaneously to, and

specifically for, the hearing where [defendant's] lack of compliance' was at issue." (*Ibid.*)

In *O'Connell*, over the defendant's hearsay objection, a report prepared by the program manager for counseling services stating that the defendant had been terminated from the program due to excessive absences was admitted at a hearing on the defendant's violation of the deferred entry of judgment program. (*O'Connell*, *supra*, 107 Cal.App.4th at pp. 1064-1065.) *O'Connell* concluded that the report was "akin to the documentary evidence that traditionally has been admissible at probation revocation proceedings" (*id.* at p. 1066) and "bore the requisite indicia of reliability and trustworthiness so as to be admissible" (*id.* at p. 1067). *O'Connell* distinguished case law dealing with the use of former testimony, finding that the "report was prepared contemporaneously to, and specifically for, the hearing where [defendant's] lack of compliance with the deferred entry of judgment program was at issue." (*Id.* at pp. 1066-1067.)

We conclude that Wheat's progress report relied upon by Aparicio likewise bore the required indicia of reliability to be admissible.[2] Aparicio testified that Wheat signed the progress report and dated it Friday, June 22, 2007, the fourth day of defendant's absence, so it was prepared contemporaneously to,

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[2] Although Wheat's progress report does not appear to have been introduced into evidence, defendant's objection was to Aparicio's reliance upon the report's content that defendant failed to attend the counseling sessions. (*Abrams*, *supra*, 158 Cal.App.4th at p. 404, fn. 4.)

and specifically for, a hearing at which defendant's lack of compliance was at issue. Wheat's presence likely would not have added anything to his statement that defendant failed to return to CDCC as ordered. Wheat's credibility was not at issue. Defendant testified and corroborated that he failed to attend the counseling sessions that Wheat reported defendant had missed. Thus, Wheat's progress report was trustworthy. Defendant does not challenge the other bases for the court's finding a violation of probation, that is, defendant's failure to attend drug court and his admitted use of marijuana after missing the counseling sessions. Any error was harmless.

II

Defendant contends that the trial court exceeded its jurisdiction in increasing the previously imposed sentence of the low term of 16 months for possession of cocaine base as well as failure to appear in case No. SF102841A, to concurrent two-year midterms for both, when it sentenced him to state prison. We conclude that defendant forfeited the issue and is estopped from complaining.

Background

On August 22, 2007, the court found defendant in violation of probation. At sentencing in all three cases on November 20, 2007, defendant sought a continuance and a release from jail in order to spend Thanksgiving with his family. The following discourse ensued:

"[DEFENSE COUNSEL]: I have talked at length with [defendant] and with his family. We need to reinstate proceedings. And [defendant] has another letter for the Court that he wrote while he was on his diagnostic. [¶] I explained to him that the Court is indicating a reluctance to send him back to felony drug court. [¶] And if you were to sentence him today, the Court had indicated the low term of 16 months on each case concurrent. [¶] [Defendant] would go along with that today if he could have a release to spend Thanksgiving with his children.

"THE COURT: What's the D.A. say?

"[PROSECUTOR]: The reason we have this here is because he was just gone. He was brought in here on warrants.

"THE COURT: We were talking about low term. If he wants to plead for midterm, bring him back Monday. If he is not here, he will get midterm or upper term.

"[DEFENSE COUNSEL]: Judge will sentence you to middle term today.

"[PROSECUTOR]: And then modify it on Monday.

"THE COURT: Yeah.

"[DEFENSE COUNSEL]: All right.

"THE COURT: It is on for sentencing?

"[DEFENSE COUNSEL]: Yes.

"THE COURT: Waive time for sentencing?

"[DEFENSE COUNSEL]: Yes.

"THE COURT: [Defendant], we have reviewed it. I looked at my notes. I looked at the probation report. I have also looked

at the [Penal Code section] 1203 report. [¶] It doesn't appear as though keeping you on probation is going to be of much benefit. That is the bad news. [¶] Good news, even though you are going to prison, low term is what you will eventually get if you show up without any problems. [¶] You could make it a bad deal by not coming in or picking up a new offense or being arrested by being under the influence or using drugs. That is going to increase it. [¶] You are only going to be gone a few months with the amount of credits you have. I am willing to try it.

"[DEFENDANT]: I am not going to make you look stupid. I will turn myself in.

"THE COURT: You keep writing about your family. You sit down and go over what is left with them. [¶] I am going to, at this time, deny probation and find the specified punishment for the plea to be a prison term. [¶] Sentence [for] defendant at this time to be two years [in] state prison. Imposition--well, that is going to be the order. [¶] Execution is stayed until Monday, the 26th. [¶] I am going to release him. If you show up, no new arrests, you are not to use alcohol or drugs during the pendency of this. [¶] You be here. I will reduce it down to low term 16 months. [¶] And we will give you credits at that time as well.

"[DEFENDANT]: Thank you.

"[DEFENSE COUNSEL]: Monday, 8:30.

"THE COURT: Don't be late."

On November 26, 2007, defendant failed to appear and the court issued a no-bail bench warrant. The prosecutor and defense counsel were present.

On November 30, 2007, defense counsel represented that defendant had reported to the jail on November 26 rather than court. On December 4, 2007, defense counsel represented that defendant had reported to the jail to turn himself in at 9:00 a.m. on November 26, but the jail had no records of that, and that defendant walked to the court, arriving at noon, spoke with someone in the clerk's office, and was told "to wait until the warrant was out." Defense counsel and the prosecutor appeared to agree that defendant was supposed to report to jail. The court stated that it had ordered defendant to report back to court on November 26, defendant signed the paper, and he received a copy, and he knew that if he failed to appear, it would be a two-year sentence. Defense counsel offered to verify that defendant showed up at the jail on the November 26. Although the court agreed to continue the matter to December 6, 2007, defendant interrupted and the following discourse ensued:

"[DEFENDANT]: Can I take my time and get it over with?

"[DEFENSE COUNSEL]: That means two years.

"[DEFENDANT]: Let me get my time over. Let me do my time and get it over with.

"THE COURT: All right, so you just want to be sentenced. Then on each of the matter[s] before the Court, the Court will order, I think we've ordered the term.

"[DEFENSE COUNSEL]: Yes, it was to be amended to the 16 months if he showed up."

The court sentenced defendant to state prison for an aggregate term of two years as follows: the midterm of two years for possession of methamphetamine in case No. SF098124A; a concurrent midterm of two years for receiving stolen property in case No. SF097884A; and concurrent midterms of two years for possession of cocaine base and failure to appear in case No. SF102841A.

Analysis

"When the trial court suspends imposition of sentence, no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation. [Citations.] The probation order is considered to be a final judgment only for the 'limited purpose of taking an appeal therefrom.' [Citation.] On the defendant's rearrest and revocation of h[is] probation, ' . . . the court may, if the sentence has been suspended, pronounce judgment for any time within the longest period for which the person might have been sentenced.' [Citations.] [Fn. omitted.] [¶] . . . Unlike the situation in which sentencing itself has been deferred, where a sentence has actually been imposed but its execution suspended, 'The revocation of the suspension of execution of the judgment brings

the former judgment into full force and effect . . . .' [Citations.] [¶] Reflecting these principles, [Penal Code] section 1203.2, subdivision (c), recites that following the defendant's rearrest, and on revocation and termination of probation, 'if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke the suspension and order that *the judgment shall be in full force and effect*.' [Citation.] [¶] . . . On revocation of probation, if the court previously had imposed sentence, the sentencing judge must order that exact sentence into effect [citations], subject to its possible recall under [Penal Code] section 1170, subdivision (d), *after* defendant has been committed to custody." (*People v. Howard* (1997) 16 Cal.4th 1081, 1087-1088.)[3]

A lack of fundamental jurisdiction means "the court was entirely without power over the subject matter or the parties." (*In re Harris* (1993) 5 Cal.4th 813, 836.) "A court [with power over the subject matter and parties] acts in excess of its jurisdiction when 'it has no "jurisdiction" (or power) to act

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[3] Penal Code section 1203.2, subdivision (c) provides: "Upon any revocation and termination of probation the court may, if the sentence has been suspended, pronounce judgment for any time within the longest period for which the person might have been sentenced. However, if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke the suspension and order that the judgment shall be in full force and effect. In either case, the person shall be delivered over to the proper officer to serve his or her sentence, less any credits herein provided for."

except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.'" (*People v. Tindall* (2000) 24 Cal.4th 767, 776.) An act in excess of jurisdiction is voidable but subject to forfeiture (the loss of a right by failing to timely assert) and estoppel; an act without fundamental jurisdiction is void and not subject to forfeiture or estoppel. (*People v. Mower* (2002) 28 Cal.4th 457, 474, fn. 6; *In re Harris*, *supra*, 5 Cal.4th at pp. 836-837; *People v. Ellis* (1987) 195 Cal.App.3d 334, 343 (*Ellis*), criticized on other grounds in *People v. Panizzon* (1996) 13 Cal.4th 68, 89, fn. 15.)

Defendant does not claim that the court lacked fundamental jurisdiction over the subject matter (the case) and the parties (defendant). And rightly so. Rarely does a court have no power over the parties or the subject of the dispute. Instead, defendant argues the court exceeded its jurisdiction. We agree.

The trial court previously imposed the low term of 16 months for possession of cocaine base as well as failure to appear in case No. SF102841A, suspended execution of sentence, and granted probation. After defendant was found in violation of probation, the court increased defendant's previously imposed sentence to two years. Although the trial court lacked the authority to modify defendant's previously imposed sentence (Pen. Code, § 1203.2, subd. (c)), the court had continuing jurisdiction over defendant and thus fundamental jurisdiction to

act. The court simply exceeded its jurisdiction. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1423-1427 (*Ramirez*).)

Defendant acknowledges the new sentence imposed on November 20, 2007, was "part of a deal [the court] struck with [him] requiring [him] to appear after Thanksgiving holiday," but argues he did not "willfully take any action to trigger the higher term" and should not be estopped from complaining. Defendant further argues that "[a]t no time" did he "ask" to be sentenced to the increased two-year term and, instead, raised an objection when his counsel explained that defendant "tried to comply with the court's order by arriving at the jail at the time he had been ordered to."

The record reflects that defendant consented twice to the court's act in excess of its jurisdiction. Defendant forfeited any error in the trial court's increasing his previously imposed sentence in excess of statutory authority. Further, defendant is estopped from complaining about his sentence, having received the benefit of the agreement.

In exchange for release to spend Thanksgiving with his family, defendant consented to the increased sentence to two years. At the sentencing hearing, when informed it would be two years but the court would listen to any contrary evidence concerning where defendant was supposed to report on November 26, defendant again consented to the increased sentence when he said he just wanted to be sentenced. Defendant failed twice to raise any claim that the sentence was greater than that

previously imposed. He forfeited his claim. Moreover, in exchange for agreeing to increase his suspended sentence, defendant received the benefit of being released from custody from November 20 through November 26, 2007, to spend Thanksgiving with his family. "The rationale justifying application of estoppel is that 'defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process.'" (*Ramirez*, *supra*, 159 Cal.App.4th at p. 1428; *Ellis*, *supra*, 195 Cal.App.3d at p. 343.) Defendant accepted the benefit and cannot be heard now to complain. (*Ibid.*) We conclude that defendant forfeited his right to challenge the increased sentence imposed and is estopped from complaining.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

RAYE, Acting P. J.

CANTIL-SAKAUYE, J.